

Seth M. Lehrman (178303)
seth@epllc.com
EDWARDS POTTINGER LLC
425 North Andrews Avenue, Suite 2
Fort Lauderdale, FL 33301
Telephone: 954-524-2820
Facsimile: 954-524-2822

Attorneys for Plaintiff
Kathryn Rohrer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

KATHRYN ROHRER, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

PHENOS COLLECTIVE, INC., d/b/a
PHENOS CANNABIS DISPENSARY,

Defendant.

CASE NO.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, Kathryn Rohrer (hereinafter “Plaintiff”), brings this class action under Rule 23 of the Federal Rules of Civil Procedure against Phenos Collective, Inc. d/b/a Phenos Cannabis Dispensary (“Phenos” or “Defendant”) for its violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (hereinafter “the TCPA”), and the regulations promulgated thereunder. In support, Plaintiff alleges as follows:

PRELIMINARY STATEMENT

1. Plaintiff brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant in negligently or willfully contacting Plaintiff on Plaintiff’s cellular

1 telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227
2 (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon
3 personal knowledge as to herself and her own acts and experiences, and, as to all
4 other matters, upon information and belief, including investigation conducted by her
5 attorneys.

6 2. “Month after month, unwanted robocalls and texts, both telemarketing and
7 informational, top the list of consumer complaints received by the [FCC].”¹ The
8 TCPA is designed to protect consumer privacy by, among other things, prohibiting
9 the making of autodialed or prerecorded-voice calls to cell phone numbers and
10 failing to institute appropriate do-not-call procedures. 47 U.S.C. § 227(b)(1)(A)(iii);
11 47 C.F.R. § 64.1200(d).

12 3. The TCPA was designed to prevent calls like the ones described within
13 this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous
14 consumer complaints about abuses of telephone technology – for example,
15 computerized calls dispatched to private homes – prompted Congress to pass the
16 TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

17 4. Additionally, the FCC has explicitly stated that the TCPA’s prohibition on
18 automatic telephone dialing systems “encompasses both voice calls and text calls to
19 wireless numbers including, for example, short message service (SMS) calls.”
20 U.S.C.A. Const. Amend. 5; Telephone Consumer Protection Act of 1991, § 3(a), 47
21 U.S.C. § 227(b)(1)(A)(iii). *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165 (N.D.
22 Cal. 2010).

23 5. In enacting the TCPA, Congress intended to give consumers a choice as to
24 how creditors and telemarketers may call them and made specific findings that
25 “[t]echnologies that might allow consumers to avoid receiving such calls are not
26 universally available, are costly, are unlikely to be enforced, or place an inordinate
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28 ¹ *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, ¶ 1 (2015).

1 burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end,
2 Congress found that:

3 [b]anning such automated or prerecorded telephone calls to the home,
4 except when the receiving party consents to receiving the call or when
5 such calls are necessary in an emergency situation affecting the health
6 and safety of the consumer, is the only effective means of protecting
telephone consumers from this nuisance and privacy invasion.

7 *Id.* at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012
8 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings on
9 TCPA’s purpose).

10 6. In an action under the TCPA, a plaintiff must only show that the defendant
11 “called a number assigned to a cellular telephone service using an automatic dialing
12 system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d
13 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

14 **JURISDICTION AND VENUE**

15 7. This Court has federal question subject matter jurisdiction pursuant to 28
16 U.S.C. § 1331 and 47 U.S.C. § 227.

17 8. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
18 because a substantial part of the events or omissions giving rise to the claims in this
19 case occurred in this District, including Defendant’s transmission of the unlawful
20 and unwanted texts to Plaintiff.

21 9. The Court has personal jurisdiction over Defendant because it conducts
22 business in this state, markets its services within this state, and has availed itself to
23 the jurisdiction of this state by sending texts to Plaintiff and Class Members in and
24 from this state.

25 **PARTIES**

26 10. Plaintiff’s domicile is in Riverbank, California.
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1 11. Defendant is a California Profit Corporation and citizen of the state of
2 California, listing its principal address at 304 Motor City Court, Modesto, California
3 95356. Phenos is also registered in the state of California.

4 12. Defendant promotes and markets its services by calling wireless telephone
5 users in violation of the TPCA.

6 13. Defendant, directly or through other persons, entities or agents acting on
7 its behalf, conspired to, agreed to, contributed to, authorized, assisted with, and/or
8 otherwise caused all of the wrongful acts and omissions, including the dissemination
9 of the unsolicited texts that are the subject matter of this Complaint.

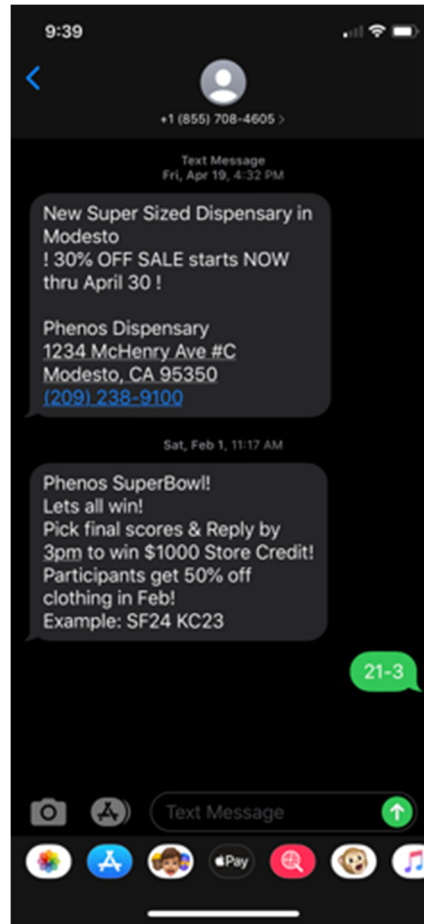
10 **FACTUAL ALLEGATIONS**

11 14. At all times relevant, Plaintiff, and at all times mentioned herein was, a
12 “person” as defined by 47 U.S.C. § 153 (39).

13 15. Defendant is a citizen of the State of California, and at all times mentioned
14 herein was, a corporation and “persons,” as defined by 47 U.S.C. § 153(39).

15 16. At all times relevant Defendant conducted business in the State of
16 California in Stanislaus County, within this judicial district.

17 17. Defendant utilizes automated telemarketing text messages to market and
18 advertise Defendant’s business and services, including at least two (2) messages to
19 Plaintiff over the past year including once on April 19, 2019 and once on February
20 1, 2020, attached below:



18. The text messages were transmitted to Plaintiff's 1987 Number, and within the time period that is relevant to this action.

19. At no time did Plaintiff provide Plaintiff's cellular number to Defendant through any medium, nor did Plaintiff consent to receive such unsolicited text messages.

20. Plaintiff has never signed-up for, and has never used, Defendant's services, and has never had any form of business relationship with Defendant.

21. Plaintiff is the subscriber and sole user of the 1987 Number and is financially responsible for phone service to the 1987 Number, including the cellular costs and data usage incurred as a result of the unlawful text messages made to Plaintiff by Defendant.

22. Through the unsolicited messages, Defendant contacted Plaintiff on Plaintiff's cellular telephone regarding an unsolicited service via an "automatic

1 telephone dialing system” (“ATDS”), as defined by 47 U.S.C. § 227(a)(1) and
2 prohibited by 47 U.S.C. § 227(b)(1)(A).

3 23. Upon information and belief, this ATDS has the capacity to store or
4 produce telephone numbers to be called, using a random or sequential number
5 generator.

6 24. Upon information and belief, this ATDS has the capacity to store numbers
7 and to dial numbers without human intervention.

8 25. Upon information and belief, Defendant used a combination of hardware
9 and software systems which have the capacity to generate or store random or
10 sequential numbers or to dial sequentially or randomly in an automated fashion
11 without human intervention.

12 26. The impersonal and generic nature of the text messages that Defendant
13 sent to Plaintiff further demonstrates that Defendant used an ATDS to send the
14 subject messages.

15 27. The content of the text messages made to Plaintiff and the Class Members
16 show that they were for the purpose of marketing, advertising, and promoting
17 Defendant’s business and services to Plaintiff as part of an overall telemarketing
18 strategy.

19 28. These messages were not for emergency purposes as defined by 47 U.S.C.
20 § 227(b)(1)(A)(i).

21 29. Plaintiff did not provide Defendant or its agents prior express consent to
22 receive messages to her cellular telephone; therefore, the unsolicited messages
23 violated 47 U.S.C. § 227(b)(1)

24 30. Defendant is and was aware that it is transmitting unsolicited telemarketing
25 text messages to Plaintiff and other consumers without their prior express consent.

26 31. Plaintiff was damaged by Defendant’s messages. In addition to using
27 Plaintiff’s residential cellular data, phone storage, and battery life, her privacy was
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wrongfully invaded, her seclusion was intruded upon, and Plaintiff has become understandably aggravated with having to deal with the frustration of repeated, unwanted messages, forcing her to divert attention away from her work and other activities. Not only did the receipt of the text messages distract Plaintiff away from her personal activities, Plaintiff was forced to spend time investigating the source of the texts and who sent them to her. *See Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1211 (11th Cir. 2018). (“[T]ime wasting is an injury in fact”.... “[A] small injury... is enough for standing purposes”).

CLASS ACTION ALLEGATIONS

32. Plaintiff brings this class action under Rule 23(a),(b)(2), and(b)(3) of the Federal Rules of Civil Procedure on behalf of herself and of a similarly situated “Class” or “Class Members” defined as:

No Consent Class: All persons within the United States who, within the four years prior to the filing of this Complaint, were sent a text message by Defendant or anyone on Defendant’s behalf, to said person’s cellular telephone number, advertising Defendant’s services, without the recipients prior express consent, using the same equipment used to call Plaintiff’s cellular telephone, in violation of the TCPA.

33. Excluded from the Class are Defendant, and any subsidiary or affiliate of Defendant, and the directors, officers and employees of Defendant or its subsidiaries or affiliates, and members of the federal judiciary.

34. This action has been brought and may properly be maintained as a class action against Defendant pursuant to Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable. Plaintiff reserves the right to amend the Class definition if discovery and further investigation reveal that any Class should be expanded or otherwise modified.

35. **Numerosity:** At this time, Plaintiff does not know the exact number of Class Members, but among other things, given the nature of the claims and that

1 Defendant's conduct consisted of standardized SPAM campaign texts placed to
2 cellular telephone numbers, Plaintiff believes, at a minimum, there are greater than
3 forty (40) Class Members. Plaintiff believes that the Class is so numerous that
4 joinder of all members of the Class is impracticable and the disposition of their
5 claims in a class action rather than incremental individual actions will benefit the
6 Parties and the Court by eliminating the possibility of inconsistent or varying
7 adjudications of individual actions.

8 36. Upon information and belief, a more precise Class size and the identities
9 of the individual members thereof are ascertainable through Defendant's records,
10 including, but not limited to Defendant's calls and marketing records.

11 37. Members of the Class may additionally or alternatively be notified of the
12 pendency of this action by techniques and forms commonly used in class actions,
13 such as by published notice, e-mail notice, website notice, fax notice, first class mail,
14 or combinations thereof, or by other methods suitable to this class and deemed
15 necessary and/or appropriate by the Court.

16 **38. Existence and Predominance of Common Questions of Fact and Law:**
17 There is a well-defined community of common questions of fact and law affecting
18 the Plaintiff and members of the Class. Common questions of law and/or fact exist
19 as to all members of the Class and predominate over the questions affecting
20 individual Class members. These common legal and/or factual questions include,
21 but are not limited to, the following:

- 22 a. Whether, within the four years prior to the filing of this Complaint,
23 Defendant or its agents called (other than a message made for
24 emergency purposes or made with the prior express consent of the
25 called party) to a Class member using any automatic dialing to any
26 telephone number assigned to a cellular phone service;
27 b. How Defendant obtained the numbers of Plaintiff and Class members;
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- c. Whether the dialing system used to call is an Automatic Telephone Dialing System;
- d. Whether Defendant engaged in telemarketing when it sent the the text messages which are the subject of this lawsuit;
- e. Whether the calls made to Plaintiff and Class Members violate the TCPA and its regulations;
- f. Whether Defendant willfully or knowingly violated the TCPA or the rules prescribed under it;
- g. Whether Plaintiff and the members of the Class are entitled to statutory damages, treble damages, and attorney fees and costs for Defendant's acts and conduct;
- h. Whether Plaintiff and members of the Class are entitled to a permanent injunction enjoining Defendant from continuing to engage in its unlawful conduct; and
- i. Whether Plaintiff and the Class are entitled to any other relief.

39. One or more questions or issues of law and/or fact regarding Defendant's liability are common to all Class Members and predominate over any individual issues that may exist and may serve as a basis for class certification under Rule 23(c)(4).

40. **Typicality:** Plaintiff's claims are typical of the claims of the members of the Class. The claims of the Plaintiff and members of the Class are based on the same legal theories and arise from the same course of conduct that violates the TCPA.

41. Plaintiff and members of the Class each received at least one telephone call, advertising the Defendant's hydroponics products or services, which Defendant placed or caused to be placed to Plaintiff and the members of the Class.

1 **42. Adequacy of Representation:** Plaintiff is an adequate representative of
2 the Class because Plaintiff's interests do not conflict with the interests of the
3 members of the Class. Plaintiff will fairly, adequately and vigorously represent and
4 protect the interests of the members of the Class and has no interests antagonistic to
5 the members of the Class. Plaintiff has retained counsel competent and experienced
6 in litigation in the federal courts, TCPA litigation, and class action litigation.

7 **43. Superiority:** A class action is superior to other available means for the fair
8 and efficient adjudication of the claims of the Class. While the aggregate damages
9 which may be awarded to the members of the Class are likely to be substantial, the
10 damages suffered by individual members of the Class are relatively small. As a
11 result, the expense and burden of individual litigation makes it economically
12 infeasible and procedurally impracticable for each member of the Class to
13 individually seek redress for the wrongs done to them. Plaintiff does not know of
14 any other litigation concerning this controversy already commenced against
15 Defendant by any member of the Class. The likelihood of the individual members
16 of the Class prosecuting separate claims is remote. Individualized litigation would
17 also present the potential for varying, inconsistent or contradictory judgments, and
18 would increase the delay and expense to all parties and the court system resulting
19 from multiple trials of the same factual issues. In contrast, the conduct of this matter
20 as a class action presents fewer management difficulties, conserves the resources of
21 the parties and the court system, and would protect the rights of each member of the
22 Class. Plaintiff knows of no difficulty to be encountered in the management of this
23 action that would preclude its maintenance as a class action.

24 **44. Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an
25 alternative to or in addition to certification of the Class under Rule 23(b)(3), class
26 certification is warranted under Rule 23(b)(2) because Defendant has acted on
27 grounds generally applicable to Plaintiff and members of Class, thereby making
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1 appropriate final injunctive relief with respect to Plaintiff and Class Members as a
2 whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds
3 generally applicable to the entire Class in order to enjoin and prevent Defendant
4 Defendant's ongoing violations of the TCPA, and to order Defendant to provide
5 notice to them of their rights under the TCPA to statutory damages and to be free
6 from unwanted calls.

7 **COUNT I**
8 **VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
9 **47 U.S.C. § 227(b)**

10 45. Plaintiff incorporates by reference all of the allegations contained in all of
11 the above paragraphs 1 through 44 of this Complaint as though fully stated herein.

12 46. It is a violation of the TCPA to make "any call (other than a call made for
13 emergency purposes or made with the prior express consent of the called party) using
14 any automatic telephone dialing system. . .to any telephone number assigned to a . .
15 . cellular telephone service . . ." 47 U.S.C. § 227(b)(1)(A)(iii).

16 47. Automatic telephone dialing system refers to "equipment which has the
17 capacity---(A) to store or produce telephone numbers to be called, using a random
18 or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §
19 227(a)(1).

20 48. Defendant—or third parties directed by Defendant—used equipment
21 having the capacity to randomly or sequentially generate telephone numbers and to
22 dial such numbers without human intervention to make non-emergency telephone
23 calls to the cellular telephones of Plaintiff and the other members of the Class
24 defined above.

25 49. These calls were made without regard to whether or not Defendant had
26 first obtained express permission from the called party to make such calls. In fact,
27 Defendant did not have prior express consent to call the cellular phones of Plaintiff
28 and the other members of the putative Class when its calls were made.

1 50. Defendant has, therefore, violated Section 227(b)(1)(A)(iii) of the TCPA
2 by using an automatic telephone dialing system to make non-emergency telephone
3 calls to the cellular phones of Plaintiff and the other members of the putative Class
4 without their prior express written consent.

5 51. The foregoing acts and omissions of Defendant constitute numerous and
6 multiple violations of the TCPA, including but not limited to each and every one of
7 the above-cited provisions of 47 U.S.C. § 227.

8 52. As a result of Defendant's negligent violations of 47 U.S.C. § 227, Plaintiff
9 and the Class are entitled to an award of \$500.00 in statutory damages, for each and
10 every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

11 53. At all relevant times, Defendant knew or should have known that its
12 conduct as alleged herein violated the TCPA.

13 54. Defendant knew that it did not have prior express consent to make these
14 calls and knew or should have known that its conduct violated the TCPA.

15 55. Because Defendant knew or should have known that Plaintiff and Class
16 Members did not give prior express consent to receive autodialed calls, the Court
17 should treble the amount of statutory damages available to Plaintiff and members of
18 the Putative Class pursuant to Section 227(b)(3)(C).

19 56. As a result of Defendant knowing and/or willful violations of 47 U.S.C. §
20 227(b), Plaintiff and the Class are entitled to an award of \$1,500.00 in statutory
21 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(C).

22 57. Plaintiff and the Class are also entitled to and seek injunctive relief
23 prohibiting such conduct in the future.

24 WHEREFORE, Plaintiff respectfully requests the Court grant Plaintiff and the
25 Class members relief against Defendant, as set forth in the Prayer for Relief below.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment in her favor and in favor of the class, against Defendant for:

- a. An order certifying this case as a class action, certifying Plaintiff as representative of the Class, and designating Plaintiff's counsel as Class counsel;
- b. Statutory damages of \$500 per call in violation of the TCPA;
- c. Willful damages at \$1,500 per call in violation of the TCPA;
- d. A declaration that Defendant's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)(iii);
- e. An injunction prohibiting Defendant from using an automatic telephone dialing system to call numbers assigned to cellular telephones without the prior express written consent of the called party;
- f. Reasonable attorney's fees and costs; and
- g. Such further and other relief as this Court deems reasonable and just.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

DATED: May 29, 2020

EDWARDS POTTINGER LLC

By: /s/ Seth M. Lehrman
Seth M. Lehrman
Attorney for Plaintiff
KATHRYN ROHRER